83-1168

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Petitioners,

—against—

WESTERN AIR LINES, INC.,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether under Title VII of the Civil Rights Act of 1964, an employer may suspend and terminate female employees for failure to meet more stringent weight requirements based entirely on sex?

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THE OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ninth

Circuit denying the petition for rehearing and suggestion for rehearing en banc, dated October 13, 1983, is set forth in the Appendix to this petition at pp. 1(a) to 1(g).

The unreported opinion of the Court of Appeals affirming the judgment below, dated July 15, 1983, is set forth in the Appendix at pp. 2(a) to 2(k).

The Findings of Fact and Conclusions of Law and the Judgment of the District Court for the Northern District of California, dated December 18, 1979, are reported at 23 FEP Cases 1043 (N.D. Cal. 1979) and are set forth in the Appendix at pp. 3(a) to 3(t).

JURISDICTIONAL STATEMENT

The Memorandum Opinion of the Court of Appeals affirming the judgment below

was entered July 15, 1983. The Order and Amended Memorandum denying the petition for rehearing and suggestion for rehearing en banc were entered on October 13, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 42 U.S.C. §2000e-2(a) are set forth in the Appendix at pp. 4(a) to 4(b).

STATEMENT OF THE CASE

Petitioner Air Line Pilots Association, International ("ALPA")[1] sued

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[1] At the time suit was filed, ALPA was the collective bargaining representative of Western's flight attendants. Thereafter, petitioner Association of Flight Attendants ("AFA") replaced ALPA as the flight attendants' bargaining representative and was added as a plaintiff by order of the District Court. The case was certified as a class action under Rule 23(b)(2) Fed R. Civ. Proc. for purposes of prospective relief; the District Court reserved decision on class certification for damages.

Western Air Lines ("Western") in 1974, in the United States District Court for the Northern District of California, on behalf of Western's female flight attendants. The suit charged, inter alia, that Western's suspension and termination of female employees solely because of their failure to meet more stringent weight requirements based entirely on sex is unlawful under section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a).[2] Petitioners sought declaratory, injunctive, and other equitable relief, and damages.

Trial was had in April, 1976. The

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[2] The District Court had jurisdiction of the action pursuant to Section 706(f)(3) of Title VII, 42 U.S.C. §2000e-5(f)(3).

facts set forth below are undisputed.[3]

Prior to 1972, Western hired only females as flight attendants. At the time of the trial, the flight attendant classification was still 98% female. (CR "14", Interr. #29, p.34; Interr. #40, p. 44).

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[3] The portions of the record relied upon in the Statement of the Case are referenced below as indexed on the District Court Docket Sheet:
RT: Reporter's Trial Transcript.
CR "14": Defendant's Responses to Plaintiffs' First Set of Interrogatories.
CR "15", "16": Exhibits to Defendant's Responses to Plaintiffs' First Set of Interrogatories, Volumes I and II.
CR "25": Defendant's Responses to Plaintiffs' Second Set of Interrogatories
CR "49": Defendant's Supplemental Responses to Plaintiffs' Interrogatories (First and Second Sets).
CR "79": Deposition of Robert H. Shockley.
CR "86": Defendant's Correction and Addendum to Supplemental Responses to Plaintiff's Interrogatories (First and Second Sets).
CR "98": Defendant's Post Trial Memo.

Since before 1963, Western has imposed grooming standards on employees who have public contact, including flight attendants. With one exception,[4] however, Western has not required any employees other than flight attendants to meet specified weight requirements.[5]

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[4] The exception was a classification of cabin personnel known as Customer Service Director ("CSD"), which was created in 1970 and eliminated in 1973. Western published weight standards for the CSD group but offered no evidence that it had ever enforced CSD weight standards. The CSD tables were also based entirely on sex and required female CSD's to weigh less than males of the same height. The weight tables for CSD's and flight attendants were not the same however; female CSD's were permitted to weigh considerably more than female flight attendants. The CSD classification, during its short tenure, was predominantly male. (CR "25", Interr. #8, p.7, Ex. 22, pp. 54-55).

[5] Before Western began to employ males in the position, flight attendants were also required to meet specified waist, hip and calf measurements. (RT 29-30)

(RT. 315, 938-939, 1053-1056; CR "25", Interr. #8, Ex. 22, pp. 54-56).

Since 1972, Western has enforced weight standards based entirely on sex which are considerably more stringent for female flight attendants than for males. Under Western's weight program, every female of a given height may not weigh more than the maximum weight prescribed for her sex, while every male of the same height is arbitrarily permitted to weigh much more. (CR "14", Interr. #29, p.34; CR "15", "16", Ex. 12, p.146).

Male flight attendants are permitted to weigh as much as 39 pounds more than female flight attendants of the same height. (CR "14", Interr. #29, p.34, CR "15", "16", Ex. 12, pp. 146-149). Female flight attendants, regardless of age, are

required to maintain their weight close to or below the average weight of college age women. Male flight attendants are permitted to exceed the average weights of males ranging from 35 to 44 years of age. (Pl. Exs. 49, 50)

Since 1971, Western has maintained a weight enforcement program. A flight attendant who exceeds the maximum weight permitted her sex is placed on a rigid weight reduction schedule. Failure to adhere to the schedule results in suspension without pay. Failure to reach the permitted maximum within 90 days following suspension results in termination. (CR "14", Interr. 29, p. 34, CR "15", "16", Ex. 12, pp. 149-150).

From 1972 through 1975, six female flight attendants were terminated and 56

female flight attendants were suspended without pay a total of 86 times for failure to maintain the weight prescribed for their sex. (CR."49", Interr. #21, p.9, Ex. 34; Interr. #24, p. 14, Ex. 36, Interr. #25, p.15; Interr. #19, p.6, Ex. 32; CR."86", Interr. #18, p.5, Ex. 30).

Western argued that compliance with its rigid schedule of sex-based weights is an integral part of its grooming standards for employees. (CR."98", p.49) But Western conceded that the actual appearance of an individual flight attendant is not considered in the enforcement of its maximum weight rules.[6]

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[6] A significant exception is failure to meet minimum weight standards. When Western revised its program in 1972 to include a weight schedule for males, it provided for the first time that flight attendants may be disciplined for failure to adhere to stated minimum weights but only upon consideration of the actual appearance of the individual flight attendant. (CR "15", "16", Ex. 12, p.149)

Western has a procedure for evaluation of flight attendant appearance, separate from the weight program. Western supervisors conduct regular in-flight check rides in the course of which they independently evaluate the individual flight attendant's actual appearance as well as performance.

Female flight attendants testified without contradiction that they had been suspended and terminated for the sole reason that they exceeded the maximum weights that Western permitted women of their height, although their actual appearance was judged satisfactory or better by their supervisors. (RT. 73, 75, 993, 994, 1040, 1042; CR "79", pp.18, 27).

Western did not attempt to defend its

weight requirements on the grounds of bona fide occupational qualification or business necessity.

In sum, under Western's weight program, women are terminated and suspended not because of their appearance but because they are women.

The District Court rejected petitioners' claims that Western's weight program discriminates on the basis of sex on the grounds that: (1) weight is subject to individual control and is not a "fundamental aspect of life"; and (2) no showing had been made that Western discriminated in the enforcement of its weight rules. Petitioners timely filed their notice of appeal from the judgment of the District Court on January 18, 1980. The Court of Appeals had

jurisdiction of the appeal pursuant to 28 U.S.C. §1291.

While the instant case was pending on appeal, the Court of Appeals for the Ninth Circuit, on November 15, 1982, issued an en banc opinion in Gerdom v. Continental Air Lines, 692 F.2d 602 (9th Cir. 1982), cert. dism., 103 S.Ct. 1534 (1983), another case challenging an airline's flight attendant weight requirements.

In Gerdom, the Court of Appeals held that weight requirements enforced only against an all-female flight attendant classification constitute unlawful sex discrimination. In dictum, the Court stated that the situation in Gerdom was distinguishable from one in which "physiologically based" weight require-

ments are imposed on both men and women. The Court emphasized that where there is "even handed" enforcement of such rules against both sexes there is no discrimination because no greater burden is imposed on either sex. 692 F.2d at 604-606.

In denying petitioners' appeal in the instant case, the Court of Appeals relied on its dictum in Gerdom, holding that Western's weight requirements are permissible "grooming rules" because they are enforced against both men and women and do not have a significant impact on either sex.

Petitioners sought rehearing and en banc consideration on the grounds that the Court's decision is contrary to and fails to apply the principles underlying

this Court's decisions in Arizona Governing Committee v. Norris, 103 S.Ct. 3492 (1983) and Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978). Petitioners argued that the decision is a departure from Norris and Manhart because the Court disregarded the material fact that Western's weight requirements are entirely sex-based and result in the suspension and termination of individual female employees who would not have been suspended or terminated but for their sex.

In denying the petition for rehearing, the Court reiterated its original holding that weight requirements which are enforced evenhandedly against both sexes and do not have a disparate impact on either group are therefore not

discriminatory. The Court failed to address petitioners' claim that Western's weight program is discriminatory because it results in individual women being treated in a manner which but for their sex would have been different.

REASON FOR ALLOWANCE OF THE WRIT

The Decision of the Court of Appeals is Contrary to and Fails to Apply the Principles Underlying this Court's Decisions in Arizona Governing Committee v. Norris and Los Angeles Department of Water & Power v. Manhart.

The Court of Appeals upheld Western's weight requirements as permissible "grooming rules" simply because weight rules are applied to both sexes and have no greater impact on the employment opportunities of one sex than the other.[7]

In upholding Western's weight tables

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[7] Petitioners assume only for purposes of this argument that the rules are fair and do not have a significant impact on women as a group; petitioners do not concede that the evidence supports those findings.

on the grounds that they do not discriminate against women as a class, the decision below is inconsistent with the basic teaching of Arizona Governing Committee v. Norris, and Los Angeles Department of Water & Power v. Manhart, "...that Title VII requires employers to treat their employees as individuals not 'as simply components of a racial, religious, sexual or national class'", Norris, 103 S.Ct. at 3498, quoting Manhart, 435 U.S. at 708. Norris and Manhart squarely rejected the assumption, which underlies the decision below, that the question of whether discrimination exists may be determined by a comparison of class characteristics.

The Court of Appeal's reliance on the absence of a "significant" impact on

women as a group undermines the purpose of the statute to achieve equality of opportunity by rooting out arbitrary practices that have a discriminatory impact upon individuals. See Connecticut v. Teal, 102 S.Ct. 2525, 2533 (1982). The decision below is wrong because it fails to consider the evidence that Western's weight program treats individual females in a manner which but for their sex would be different. See Manhart, 435 U.S. at 713.

Western's weight program is unlawful because it prescribes that every female of a given height may not weigh more than a given maximum weight while every male of the same height is allowed to weigh much more, based simply on sex. Western's program makes no attempt at

individualization and disregards actual appearance.[8] It treats women entirely as members of a sexual class.

Even if Western's weight standards may be physiologically justified because women as a group weigh less than men, they are nonetheless unlawful,[9] because

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[8] Except for the limited purpose of their argument herein, Petitioners do not concede the lawfulness of Western's overall appearance criteria for flight attendants; however, consideration of the validity of those criteria is not necessary for resolution of the issue before this Court.

[9] However, Petitioners established that Western's weight requirements for female flight attendants are not based on any valid physiological generalizations. First, Western admitted that its flight attendant weight tables are arbitrary. Secondly, the independent evidence establishes that Western's weight tables are not based on physiological generalizations: 1) From 1970 to 1973 female flight attendants were required to weigh much less than females in the predominantly male CSD classification; and 2)

"...[u]nder the statute '[e]ven a true generalization about [a] class cannot justify class based treatment.'" Norris, 100 S.Ct. at 3498, quoting Manhart, 435 U.S. at 709.

The decision of the Court of Appeals thus clearly undermines the basic policy of Title VII which mandates fairness to individuals and prohibits treating individuals simply as components of the sexual class. Manhart, 435 U.S. at 708-710.

CONCLUSION

The Court of Appeals' decision is a clear departure from the pronouncements

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female flight attendants are required to maintain weights approximating those of college age women while male flight attendants are allowed to attain weights averaged by males ranging from 35 to 44 years of age. (RT. 687; CR "25", Ex. 22, CR "15", "16", Ex. 12).

of this Court. It substantially undermines the policy of Title VII which requires that the focus be on fairness to individuals.

It is respectfully requested that certiorari be granted to apply the principles articulated in Arizona Governing Committee v. Norris and Los Angeles Dep't of Water & Power v. Manhart to Western's suspension and termination of female flight attendants for failure to meet more stringent weight rules based entirely on sex.

Respectfully submitted,

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Dated: New York, New York
January 9, 1984

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and ASSOCIATION OF FLIGHT ATTENDANTS, Plaintiff-Appellants, vs. WESTERN AIR LINES, INC., Defendant-Appellee.	)	No.80-4043 O R D E R

BEFORE: CHOY, PREGERSON, and POOLE, Circuit Judges.

The panel as constituted above has voted to amend its Memorandum and to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The amended Memorandum has been circulated to the full court and the full

court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The Clerk is ordered to file the amended Memorandum attached to this order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and ASSOCIATION OF FLIGHT ATTENDANTS, Plaintiff-Appellants, vs. WESTERN AIR LINES, INC., Defendant-Appellee.	)	No.80-4043 DC No. 74-1418-RHS AMENDED MEMORANDUM

Appeal from the United States
District Court for the Northern
District of California
Hon. Robert H. Schnacke, Judge,
Presiding

Argued February 8, 1982;
Submitted November 15, 1982

BEFORE: CHOY, PREGERSON, and POOLE,
Circuit Judges.

Appellants are a class of women who have been, are now, or will be employed

by Western Air Lines as flight attendants. The class representatives are the Air Line Pilots Association, International ("ALPA"), and the Association of Flight Attendants ("AFA"). The appellee is Western Air Lines ("Western").

Appellants sued Western in 1974, charging that Western's maternity policies and weight control program for flight attendants constituted unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. They sought declaratory relief, an injunction and money damages. A bench trial was held in 1976. In 1979, the district court ruled that there had been no title VII violation. We affirm.

Mandatory Maternity Leave

Western requires flight attendants to stop flying as soon as they receive medical confirmation of pregnancy. Pregnant flight attendants may be considered for temporary assignment to any available non-flying position for which they are qualified. If a temporary assignment is not available, they must take a maternity leave of absence. Flight attendants on maternity leave maintain and accrue seniority.

This court upheld an identical policy against Title VII challenge in Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980), reasoning that passenger safety considerations justify the regulations. We are bound by that decision.

The Return-to-Work Policy

The district court concluded as a matter of law that Western's return-to-work policy for employees who have been on pregnancy leave is less generous than its return-to-work policy for employees who have been absent from work because of medical conditions other than pregnancy. New mothers, the court found, get 90 days of automatic leave. The leave can be extended to a maximum of six months following birth, but only if Western's medical examiner approves. The court found, on the other hand, that sick leave for any other medical reason is granted automatically for up to three continuous years. Such leave can be extgended beyond three years if ALPA and Western agree. Approval by Western's medical

examiner is never necessary. The district court ruled that this difference in treatment between persons seeking maternity leave and persons seeking other medical leave does not constitute sex discrimination.

Prior to 1978, the Title VII definition of sex discrimination did not mention pregnancy. Thus, the Supreme Court ruled that an employer did not violate Title VII if it denied medical and disability benefits to pregnant women, but granted those same benefits to employees in need of any other medical treatment. General Electric v. Gilbert, 429 U.S. 125 (1976). The court in that case held that:

> it is impossible to find any gender-based discriminatory effect in this scheme simply because women disbled as a result of pregnancy do

> not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive.

Id. at 138-39 (footnote omitted). Under that ruling, it did not violate Title VII for Western to have a more restrictive return-to-work policy for flight attendants on maternity leave than for flight attendants on leave for other medical reasons.

In October 1978, Congress amended the Title VII definition of sex discrimination. Discrimination based on pregnancy is now specifically prohibited by 42 U.S.C. §2000e(k). This amendment became effective a year prior to the district court's decision, but after the close of evidence. There is therefore no evidence in the record concerning Western's

post-1978 policy on maternity benefits, and we do not rule on its validity.

Weight Control Program

In Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 610 (9th Cir. 1982) (en banc) we held that Continental Airlines' weight program, which applied exclusively to female flight attendants, constituted discriminatory treatment on the basis of sex in violation of Title VII. In that case, Continental enforced no similar weight requirements for any job classification which included men.

Here, on the other hand, men in comparable positions have been subject to weight control programs. Prior to 1972, when Western started hiring male flight attendants, male Customer Service Directors were required to keep their

weight within certain limits. Western's male flight attendants have been required to follow a weight control program since the airline first started hiring them. In Gerdom, we stated that "[w]e ... agree with the numerous decisions defining permissible grooming rules for male and female employees as those which do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes." Id. at 605-06. (citations omitted). We agree with the district court that Western's policies were non-discriminatory.

AFFIRMED.

UNITED STATES COURT OF APPEALS
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Appellants are a class of women who have been, are now, or will be employed

by Western Air Lines as flight attendants. The class representatives are the Air Line Pilots Association, International ("ALPA"), and the Association of Flight Attendants ("AFA"). The appellee is Western Air Lines ("Western").

Appellants sued Western in 1974, charging that Western's maternity policies and weight control program for flight attendants constituted unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. They sought declaratory relief, an injunction and money damages. A bench trial was held in 1976. In 1979, the district court ruled that there had been no title VII violation. We affirm in part and reverse in part.

Mandatory Maternity Leave

Western requires flight attendants to stop flying as soon as they receive medical confirmation of pregnancy. Pregnant flight attendants may be considered for temporary assignment to any available non-flying position for which they are qualified. If a temporary assignment is not available, they must take a maternity leave of absence. Flight attendants on maternity leave maintain and accrue seniority.

This court upheld an identical policy against Title VII challenge in Harriss v. Pan American World Airways, Inc., 649 F.2d 670 (9th Cir. 1980), reasoning that passenger safety considerations justify the regulations. We are bound by that decision.

The Return-to-Work Policy

The district court concluded as a matter of law that Western's return-to-work policy for employees who have been on pregnancy leave is less generous than its return-to-work policy for employees who have been absent from work because of medical conditions other than pregnancy. New mothers, the court found, get 90 days of automatic leave. The leave can be extended to a maximum of six months following birth, but only if Western's medical examiner approves. The court found, on the other hand, that sick leave for any other medical reason is granted automatically for up to three continuous years. Such leave can be extended beyond three years if ALPA and Western agree. Approval by Western's medical

examiner is never necessary. The district court ruled that this difference in treatment between persons seeking maternity leave and persons seeking other medical leave does not constitute sex discrimination.

The correctness of the court's ruling must be analyzed under Title VII as that statute existed prior to 1978, and in light of amendments Congress enacted that year pertaining to pregnancy.

Prior to 1978, the Title VII definition of sex discrimination did not mention pregnancy. Thus, the Supreme Court ruled that an employer did not violate Title VII if it denied medical and disability benefits to pregnant women, but granted those same benefits to employees in need of any other medical treatment.

General Electric v. Gilbert, 429 U.S. 125 (1976). The court in that case held that:

> it is impossible to find any gender-based discriminatory effect in this scheme simply because women disbled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive.

Id. at 138-39 (footnote omitted). Under that ruling, it did not violate Title VII for Western to have a more restrictive return-to-work policy for flight attendants on maternity leave than for flight attendants on leave for other medical reasons.

In October 1978, Congress amended the Title VII definition of sex discrimination. Discrimination based on pregnancy is now specifically prohibited by 42

U.S.C. §2000e(k):

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

The legislative history of section 2000e(k), as well as the language of the statute itself, make it clear that "distinctions based on pregnancy are [after October 31, 1978] per se violations of Title VII." H.R. Rep. No. 948, 95th Cong., 2d Sess. 3, reprinted in [1978] U.S. Code Cong. & Ad. News, pp. 4749-51.

Per se discrimination is justified

under Title VII only "in those certain instances where ... sex [or, as in this case, nonpregnancy] ... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business." 42 U.S.C. §2000e-2(e). This so-called "BFOQ defense" constitutes "an extremely narrow exception to the general prohibition of discrimination on the basis of sex." Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (footnote omitted).

There have been very few instances where this court has found per se discrimination against pregnant women to be justified by a BFOQ defense. There must be something akin to the compelling passenger safety concerns voiced by the airline in Harriss v. Pan American World

Airways, Inc., 649 F.2d at 675, to allow an employer to discriminate against pregnant women.

Western's arguments -- that its return-to-work policy for new mothers has no adverse impact on women and does not provide them with disparate treatment -- are irrelevant. Those arguments presume that appellants are required to establish a prima facie case of discrimination. This is no longer true. Since the 1978 amendments to Title VII which make discrimination on the basis of pregnancy per se unlawful, Western has the burden of justifying its policy as a BFOQ. It has not done so. Therefore, its policy is invalid.

Weight Control Program

In Gerdom v. Continental Airlines,

Inc., 692 F.2d 602, 610 (9th Cir. 1982) (en banc) we held that Continental Airlines' weight program, which applied exclusively to female flight attendants, constituted discriminatory treatment on the basis of sex in violation of Title VII. In that case, Continental enforced no similar weight requirements for any job classification which included men.

Here, on the other hand, men in comparable positions have been subject to weight control programs. Prior to 1972, when Western started hiring male flight attendants, male Customer Service Directors were required to keep their weight within certain limits. Western's male flight attendants have been required to follow a weight control program since the airline first started hiring them.

In Gerdom, we stated that "[w]e ... agree with the numerous decisions defining permissible grooming rules for male and female employees as those which do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes." Id. at 605-06. (citations omitted). We agree with the district court that Western's policies were non-discriminatory.

AFFIRMED in part and REVERSED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; ASSOCIATION OF FLIGHT ATTENDANTS, Plaintiffs,	) C-74-1418 RHS
vs.	)FINDINGS OF FACT
WESTERN AIR LINES, INC., Defendant.	)AND CONCLUSIONS OF LAW

Plaintiffs in this case contend that certain of defendant's policies toward its flight attendants constitute sex discrimination, in violation of Title VII of the 1964 Civil Rights Act (hereinafter, "Title VII"). The challenged policies concern weight standards and pregnancy. This case has been tried by this Court, without a jury. This Court, having considered the evidence at trial and the arguments of both

sides, now makes its Findings of Fact and Conclusions of Law. All references to Title VII in these Findings of Fact and Conclusions of Law are to Title VII as it read before and during the trial of this case.

I. FINDINGS OF FACT

A. Introductory Matters:

1. All Findings of Fact set forth under the heading "Conclusions of Law" are incorporated herein by reference.

2. Defendant is a corporation which does business in the Northern District of California and which employs more than 25 employees.

3. Plaintiff Air Line Pilots Association, International (hereinafter, "ALPA") is the collective-bargaining representative for those persons employed by defendant as flight attendants. Such

persons are members of plaintiff Association of Flight Attendants (hereinafter, "AFA") and are not members of ALPA. AFA is an affiliate of ALPA.

4. The issues in this case were the subject of charges which ALPA filed in 1972 and 1973 with the Equal Employment Opportunity Commission (hereinafter, "EEOC"). Within 90 days before the complaint in the case at bar was filed in this Court, the EEOC issued a notice of ALPA's right to sue regarding the issues in its aforementioned charges.

5. Pursuant to F.R.Civ.P., Rule 23(b)(2), this Court has certified this case as a class action, with respect to the issues of: (a) whether defendant has violated Title VII, in the ways alleged in the complaint; and (b) whether, if such violations exist, declaratory and

injunctive relief should be granted against defendant. The class which has been certified consists of all women who have been, are presently, or will be, employed by defendant as flight attendants.

6. At all relevant times before June 1972, defendant employed only women as flight attendants. During the period from June 1972 to the time of the trial of this case, defendant employed some male flight attendants, but over 95% of the flight attendants employed by defendant in this period were female.

B. Weight Standards:

7. Since before 1963 defendant, among other appearance and grooming standards, has required each of defendant's flight attendants to maintain body weight within a maximum and minimum range that

is related to the person's height. In the period since September 1972, defendant has had a weight-control program for both male and female flight attendants.

8. Under that program: (a) the maximum allowable weight for a male of a particular height always is greater than the maximum allowable weight for a female of the same height; (b) the minimum allowable weight for a male of a particular height always is greater than the minimum allowable weight for a female of the same height.

9. In 1973-1974 five flight attendants--four females and one male--were discharged for exceeding their maximum allowable weights, and 59 flight attendants--all females--were suspended a total of 86 times for exceeding their maximum allowable weights.

10. Many flight attendants--over 95% of them female--have received letters of warning in connection with defendant's maximum-weight standards. However, such a letter does not cause the flight attendant who receives it to suffer a loss of income.

11. No flight attendant has been disciplined for failing to adhere to minimum-weight standards.

C. Pregnancy Leave:

12. Defendant requires that a flight attendant, immediately on discovering that she is pregnant, resign or go on pregnancy leave of absence.

13. Among the factors associated with pregnancy are nausea, clumsiness, increased fatigue, and a tendency to become dizzy and lightheaded. These factors: (a) increase the chance that a

flight attendant will be injured during a flight, so that the attendant would be unable to perform her duties during an emergency situation; (b) decrease the flight attendant's effectiveness in an emergency situation.

14. A flight attendant's pregnancy might cause her to be less willing to take risks than she would be if she was not pregnant. However, the willingness of a flight attendant to take risks can be crucial during an emergency situation.

15. A pregnant flight attendant is subject to rapid and uncontrollable emotional changes, which could cause the attendant to break down during an emergency situation.

16. There is a significant chance

that a pregnant flight attendant will miscarry unexpectedly and during a flight, which miscarriage would preclude the attendant's functioning appropriately during an emergency situation.

17. Some pregnant flight attendants would be able to perform even during an emergency situation, but it is impossible or impractical to determine in advance which pregnant flight attendants would be in that category. A failure by a flight attendant to perform properly during an emergency situation easily can result in death or serious injury to passengers.

D. Pregnancy and Fringe Benefits:

18. After termination of pregnancy, a flight attendant gets 90 days of automatic leave. The flight attendant is discharged by defendant unless she returns to work by the end of that 90-day

period or unless her leave is extended. Such extension would be based on a written request, which is to be made within the 90-day period and which is approved by defendant's medical examiner. However, the maximum leave after termination of pregnancy is six months, regardless of the flight attendant's health. In contrast, sick leaves for situations other than pregnancy automatically may extend up to three continuous years and may be extended thereafter by agreement between ALPA and defendant, which extension need not be approved by defendant's medical examiner.

19. Defendant does not provide sick-leave pay: (a) to flight attendants on pregnancy leave; or (b) for illnesses due to pregnancy-related complications.

20. Defendant's medical-insurance

program provides a maximum of only $350 in benefits for normal pregnancy, which limitation is not imposed for other medical conditions.

21. Defendant's California employees are covered by California's state disability-insurance program, while defendant's employees outside California are covered by a private disability-insurance program. At all relevant times: (a) neither program covered disability due to pregnancy; (b) defendant made no contributions to either program and had no control over the coverage of either program.

II. CONCLUSIONS OF LAW

A. Introductory Matters:

1. All Conclusions of Law set forth under the heading "Findings of Fact" are incorporated herein by reference.

2. Pursuant to 42 U.S.C. §2000e-5(f), this Court has subject-matter jurisdiction of this case.

3. Defendant is an "employer" for Title VII purposes [see 42 U.S.C. §§2000e(b), 2000e-2(a)].

B. Weight Standards:

4. Defendant maintains weight standards for its female flight attendants which differ from the weight standards which defendant maintains for its male flight attendants. However, such a difference in weight standards does not constitute sex discrimination violative of Title VII, because how much one weighs: (a) is an aspect of one's personal appearance that generally is subject to one's own control; and (b) is not a fundamental aspect of life, in the sense that, for example, marriage,

pregnancy, and child-rearing are fundamental aspects of life [see Baker v. California Land Title Co., 507 F.2d 895, 896-898 (9th Cir. 1974); Jarrell v. Eastern Air Lines, Inc., 430 F.Supp. 884, 891-893 (E.D.Va. 1977), aff'd, 577 F.2d 869, 870 (4th Cir. 1978)].

5. Plaintiffs have failed to show that defendant's enforcement of its weight standards discriminates against female flight attendants and in favor of male flight attendants. While defendant has disciplined few males in connection with defendant's maximum-weight standards, this fact is a reflection of the low percentage of flight attendants who have been male.

C. Pregnancy Leave:

6. Plaintiff have requested this Court to incorporate into the record in

this case: (a) the affidavit of Michael Abram, an attorney for plaintiffs; and (b) the exhibits to that affidavit. The affidavit and the exhibits thereto were prepared after the close of the trial in this case and indicate that the policy of various airlines other than defendant is to allow flight attendants to continue working during at least part of their pregnancy. Plaintiffs' request should be, and hereby is, granted.

7. That other airlines follow policies contrary to defendant's mandatory-pregnancy-leave policy, however, does not make defendant's policy illegal under Title VII. This is because: (a) the policy was not intended by defendant to effect sex discrimination; (b) the evidence at trial shows that defendant has a rational basis for believing that elimi-

nating or modifying the policy would increase the likelihood of risk of harm to defendant's passengers, to whom defendant owes a duty to operate with the highest degree of safety; and (c) the Abram affidavit and the exhibits thereto fail to indicate what the effect of the other airlines' policies has been and what the rationale for the policies of some of those other airlines has been [see Harriss v. Pan Am. World Airways, Inc., 437 F.Supp. 413, 430-436 (N.D.Cal. 1977)].

D. Pregnancy and Fringe Benefits:

8. Defendant's sick-leave-pay program does not cover pregnancy, and defendant's medical-insurance program covers pregnancy less generously than the program covers other medical conditions. However, the two programs' treatment of

pregnancy does not constitute sex discrimination, violative of Title VII, because: (a) their treatment of pregnancy is not intended to effect sex discrimination; (b) the programs do not deny women any protection that the programs grant to men; and (c) the programs do not have a sexually-discriminatory effect [see Nashville Gas Co. v. Satty, 434 U.S. 136, 143-146 (1977)].

9. At all relevant times, the disability-insurance programs protecting defendant's employees did not cover pregnancy. However, in view of defendant's lack of contributions to either program and lack of control over either program's coverage, defendant, in connection with these programs, has not violated Title VII. And for the reasons

mentioned in Conclusion of Law #8, defendant would not be in violation of Title VII, even if defendant were fully responsible for its employees' disability-insurance programs.

10. Defendant's return-to-work policy is a type of employee benefit, since it provides that an employee will not be discharged even though he or she stays off work for a particular amount of time. Defendant's return-to-work policy for employees who have been on pregnancy leave is less generous than is defendant's return-to-work policy for employees who have been absent from work because of medical conditions other than pregnancy. However, this difference in treatment does not constitute sex discrimination violative of Title VII, because: (a) the difference is not intended to

effect sex discrimination; (b) the return-to-work policy, in its coverage of any particular medical condition, does not deny women any advantage that it grants to men; (c) it has not been shown that any female flight attendant has been prejudiced by the way the return-to-work policy treats pregnancy [see Harriss v. Pan Am. World Airways, Inc., 441 F.Supp. 881, 882-883 (N.D.Cal. 1977); Nashville Gas Co. v. Satty, supra].

E. Relief:

11. This Court concludes that defendant has not violated Title VII. Thus: (a) plaintiffs are entitled to no relief in this case; and (b) defendant should be awarded its costs.

12. It is sometimes appropriate for an award of costs to a defendant in a Title VII case to include attorney's

fees. However, defendant in the case at bar should not be awarded attorney's fees, since: (a) plaintiffs have not litigated this case in bad faith; and (b) neither plaintiffs' claims not its contentions have been frivolous, unreasonable, or groundless [see 42 U.S.C. §2000e-5(k); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)].

Dated: December 18, 1979

/s/
Robert H. Schnacke
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; ASSOCIATION OF FLIGHT ATTENDANTS,	)	C-74-1418 RHS
Plaintiffs,	)	
vs.	)	
WESTERN AIR LINES, INC.,	)	JUDGMENT
Defendant.	)	

In accordance with the accompanying Findings of Fact and Conclusions of Law, it is hereby adjudged that: (a) plaintiffs shall receive no relief in this action; (b) the complaint and the action are dismissed; (c) defendant is entitled to recover, from plaintiffs, defendant's costs; (d) defendant shall not recover from plaintiffs any of defendant's attorney's fees.

Dated: December 18, 1979

/s/
Robert H. Schnacke
United State District Judge

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §2000e-(2) provides in pertinent part that:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's

race, color, religion, sex or national origin . . .

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No. 83-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Petitioners,

v.

WESTERN AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question presented for review by the Court is more appropriately stated as follows:

Whether an employer's grooming and appearance standards for its public contact employees, evenhandedly applied to and equally maintainable by employees of both sexes, violate Title VII of the Civil Rights Act of 1964 merely because they are not identical for males and females.

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Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1168

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

and

ASSOCIATION OF FLIGHT ATTENDANTS,
Petitioners,

v.

WESTERN AIR LINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Western Air Lines, Inc. ("Western"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the affirmance by the United States Court of Appeals for the Ninth Circuit of the judgment of the United States District Court for the Northern District of California dismissing Petitioners' complaint.

STATEMENT OF THE CASE

In this class action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), Petitioners, the Air Line Pilots Association, International and the Association of Flight Attendants, contend that the maximum weight requirements of Western's grooming and appearance standards sexually discriminate against female flight attendants.

Western has maintained a weight control program as part of its grooming and appearance standards since at least 1963. (CR "72," ¶ 4)[1] Prior to June 1972, Western employed only women as flight attendants. Thereafter, Western's weight control program applied to flight attendants of both sexes. (CR "72," ¶ 4) Western's weight standards were fair and equally maintainable by male and female flight attendants. (Tr. 246-259) Although Western's hiring standards were such that only one in twenty applicants was offered a position, approximately 82 percent of the female applicants and approximately 83 percent of the male applicants satisfied the hiring weight standard. (Tr. 898-900)[2] Western also enforced the weight standards in an evenhanded and non-discriminatory manner. Weight checks were administered in the same manner for both sexes. (Tr. 253) Both sexes had the same difficulty in meeting the weight standard, (Tr. 252) and approximately the same percentage of male and female flight attendants was suspended and terminated for exceeding the weight limits.

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[1] The citations to those parts of the record relied upon in the Statement of the Case are as follows: "Tr." refers to the Reporter's Transcript of the trial. "CR '72' " refers to the "Agreed Pre-Trial Order" as numerically indexed on the district court's docket sheet. The numbers following these citations refer to the page(s) or paragraph of the cited document which provide support for the immediately preceding proposition.

[2] Western's maximum hiring weights were four pounds lighter than its maximum post-hiring weights for flight attendants. (*Id.*)

(Tr. 894) Petitioners offered no evidence that a single male attendant exceeding the maximum weight standard had not been disciplined in accordance with Western's normal policy.

Following trial on the merits, the district court issued findings of fact and conclusions of law exonerating Western of any Title VII violation with respect to its weight policy. The Court of Appeals for the Ninth Circuit, having recently ruled in *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, —— U.S. ——, 103 S. Ct. 1534 (1983), that Continental's weight policy violated Title VII because it applied only to female flight attendants, affirmed the district court's decision. The court ruled that Western's policy was the sort of grooming standard, permitted by Title VII, which was evenhandedly applied to both sexes and which did not deprive either sex of employment opportunities. Petitioners' requests for rehearing and *en banc* consideration were rejected.

For purposes of their petition to this Court, Petitioners necessarily concede that Western's other grooming and appearance standards are lawful and that Western's weight standards are fair and do not have an adverse impact on female flight attendants as a group.

SUMMARY OF THE ARGUMENT

Title VII was enacted to insure equal employment opportunities for all persons. It was not intended to force employers to adopt ambisextrous grooming and appearance standards for its employees. All circuit courts which have addressed the issue have properly held that an employer's grooming and appearance standards for its male and female employees, which are evenly applied and which do not deprive either sex of employment opportunities, do not violate Title VII simply because they are not identical. No decisions of this Court are in conflict with or suggest a need to review the principles well established by the circuit court decisions.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's Decision Conforms With The Decisions Of All Circuit Courts Which Have Addressed Grooming And Appearance Standards

Petitioners argue that Title VII prohibits an employer from maintaining any form of grooming and appearance regulation that is not based on a unisex standard. The Court of Appeals for the Ninth Circuit rejected that argument, as has every other circuit court which has addressed an employee's Title VII challenge to his or her employer's grooming standards. The circuit courts are in agreement that where grooming and appearance standards do not deprive the members of either sex of employment opportunities and are evenhandedly applied to employees of both sexes, they are beyond the reach of Title VII.[3] *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602, 605-606 (9th Cir. 1982) (en banc), *cert. dismissed*, —— U.S. ——, 103 S. Ct. 1534 (1983) (approving evenhandedly applied grooming standards including weight control policy); *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 755-756 (9th Cir. 1977) (tie requirement for men); *Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (hair length for men); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 457 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (weight standard for flight attendants); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (hair length for men); *Knott v. Missouri Pacific Railroad Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) (hair length for

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[3] Such cases are distinguishable from those decisions where the employer applies special appearance rules to only one sex that are unduly burdensome. *E.g., Carroll v. Talman Federal Savings & Loan Association of Chicago*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980) (only female employees required to wear uniforms); *Laffey v. Northwest Airlines, Inc.*, 366 F. Supp. 763, 790 (D.D.C. 1973), *modified on other grounds*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (forbidding only female flight attendants to wear glasses).

men); *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (hair length for men); *Baker v. California Land Title Co.*, 507 F.2d 895, 896-898 (9th Cir. 1974), *cert. denied*, 422 U.S. 1046 (1975) (hair length for men); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973) (hair length for men); *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884, 891-893 (E.D. Va. 1977), *aff'd per curiam*, 577 F.2d 869 (4th Cir. 1978) (weight standard for flight attendants); *Cox v. Delta Air Lines*, 14 FEP Cases 1767, 1768 (S.D. Fla. 1976), *aff'd without published opinion*, 553 F.2d 99 (5th Cir. 1977) (weight standard for flight attendants). *Accord EEOC v. Delta Air Lines, Inc.*, 441 F. Supp. 626 (S.D. Tex. 1977), *rev'd on other procedural grounds without published opinion*, 619 F.2d 81 (5th Cir. 1980) (weight standard for flight attendants). *See Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1350-51 (4th Cir. 1976) (hair length for men); *Fagan v. National Cash Register*, 481 F.2d 1115, 1121-1125 (D.C. Cir. 1973) (hair length for men) applying same general rule to positions wherein only one sex was represented).

These decisions fully recognize that the purpose of Congress in enacting Title VII was to achieve equal employment opportunities for men and women and to eliminate those artificial, arbitrary and unnecessary barriers that favor certain employees over others. *Willingham*, 507 F.2d at 1091; *Baker*, 507 F.2d at 897. They also recognize Title VII's focus on the individual, as emphasized by the Fifth Circuit in *Willingham*. The court there said that "the Act should reach any device or policy of an employer which serves to deny acquisition and retention of a job or promotion in a job to an individual *because* the individual is either male or female." *Willingham*, 507 F.2d at 1091 (emphasis in original); *Baker*, 507 F.2d at 896. And yet all concur that Title VII was not intended to force employers to adopt ambisextrous grooming and appearance standards.

Title VII requires no more than equal treatment of the sexes. Where the decision of whether to comply with an employer's grooming standards rests with the individual employee, and the standards are otherwise evenhandedly applied and are not a pretext to exclude one sex, there simply is no basis for a finding of sex discrimination. This was clearly articulated in *Willingham*, where the court stated:

> Equal employment *opportunity* may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race[, sex,] and national origin. . . . Hair length is not immutable and in the situation of employer vis à vis employee enjoys no constitutional protection. If the employee objects to the grooming code he has the right to reject it by looking elsewhere for employment, or alternatively he may choose to subordinate his preference by accepting the code along with the job.

507 F.2d at 1091 (emphasis in original). Similarly, in *Baker*, the Ninth Circuit recognized that this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was "not talking in terms of hair styles or modes of dress over which the job applicant has complete control. The Court was addressing itself to characteristics which the applicant, otherwise qualified, had no power to alter." *Baker*, 507 F.2d at 897. *Accord Earwood*, 539 F.2d at 1351; *Dodge*, 488 F.2d at 1336-1337. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) ("Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens . . . .").[4]

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[4] Even if Title VII were intended to foreclose employers from treating male and female employees differently based on theoretically mutable conditions related to such traditionally fundamental rights as pregnancy, marriage, or the right to rear a child, *see, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)

The circuit courts have consistently held that an employer's grooming policies cannot violate Title VII where they are evenhandedly applied to both sexes and do not impede an employee's employment opportunities. As Petitioners concede the fairness of Western's policies and their lack of adverse impact, no substantial issues are presented for review by this Court.

II. This Court's Decisions In *Manhart* And *Norris* Are Inapplicable To This Case

Petitioners suggest that the principles consistently applied by the circuit courts conflict with this Court's decisions in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, —— U.S. ——, 103 S. Ct. 3492 (1983). That is, Petitioners contend that because this Court has stated that "Title VII requires employers to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual or national class,'" *Norris*, 103 S. Ct. at 3498 (emphasis in original) (quoting *Manhart*, 435 U.S. at 708), Western's maximum weight standards must be identical for male and female flight attendants, even though men weigh more than women. Petitioners clearly misread *Manhart* and *Norris*.

In *Manhart* and *Norris* this Court barred an employer's use of sex based longevity tables to calculate pension fund premiums or benefits. The tables indicated that, on the average, women live longer than men and that women would theoretically receive more payments than men after retirement. The pension plan in *Man-*

(per curiam); *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). Title VII simply was not intended to intrude so far into an employer's workplace as to regulate the length of its employees' hair, their mode of dress or the girth of their waists, if the standards do not otherwise discriminate. *Laffey*, 567 F.2d at 457; *Knott*, 527 F.2d at 1252; *Willingham*, 507 F.2d at 1091.

hart exacted higher premiums from females than males, but paid equal benefits. The plan in *Norris* exacted equal premiums, but paid women a smaller monthly annuity.

This Court, based on Title VII's prohibition against treating individuals as components of a racial, religious, sexual, or national class, determined in *Manhart* that the employer discriminated against its female employees by deducting more from their paychecks than from the paychecks of their male counterparts, because there was "no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based." 435 U.S. at 708. To the contrary, explained the Court, "[m]any of those individuals will not live as long as the average man. While they were working, those individuals received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire." *Id. Accord Norris*, 103 S. Ct. at 3498-3499 (same conclusion where the discrimination involved smaller payouts after retirement).

The concern addressed in *Manhart* and *Norris* was that an individual woman might be discriminated against because she did "not share the characteristic that differentiates the average class representatives." *Manhart*, 435 U.S. at 708. There was no way to assure that any woman would be fairly treated, because there was no way to assure that the additional burden borne by any woman during employment would be compensated by greater benefits after employment. *Id.*

The concern addressed by this Court in *Manhart* and *Norris* is not present in this case. Every flight attendant, including each member of Petitioners' class, necessarily met the weight standards as of their date of hire. Unlike a person's age, life expectancy, height, or sex, a person's weight, like the length of one's hair or the clothes one wears, is a mutable characteristic reasonably controllable by most individuals. *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884, 892 (E.D. Va. 1977),

aff'd per curiam, 577 F.2d 869 (4th Cir. 1978). It is no more difficult for a woman to maintain a specific weight than it is for a man. (Tr. 246-259); *Jarrell*, 430 F. Supp. at 892; *Leonard v. National Airlines, Inc.*, 434 F. Supp. 269, 274 (S.D. Fla. 1977). Thus in this case, unlike in *Manhart* and *Norris*, every flight attendant, including each member of Petitioners' class, can conform with the standard and, furthermore, can determine at all times whether he or she is in conformity with that standard.

Conceding that the weight rule is fairly applied and without adverse impact, Petitioners' only argument is that the standards are discriminatory because they are not identical for male and female flight attendants. First, as applied to the class in this case, the standards are equal. All flight attendants must satisfy the standard to be hired. No individual member of the Petitioners' class is subjected to any greater burden or treated any differently than any male flight attendant because of that individual's sex.

Western does discriminate against individual male and female flight attendants who are overweight, but Title VII affords no protection against an employer's policy that discriminates on the basis of individual characteristics other than sex, race, religion, or national origin. *Manhart*, 435 U.S. at 715; *General Electric Co. v. Gilbert*, 429 U.S. 125, 138-140 (1976). Indeed, *Manhart* and *Norris* themselves note that pension funds might properly discriminate on the basis of other factors related to longevity, such as "smoking habits, alcohol consumption, weight, medical history, or family history." *Norris*, 103 S. Ct. at 3495; *Manhart*, 435 U.S. at 709-710.

Petitioners err in arguing that Western's policy does not satisfy the individual consideration requirement of *Manhart* and *Norris*. In those cases, every woman paid either higher premiums or received lower benefits solely because she was a woman and not because of an individual assessment of her life expectancy. Here, each

prospective flight attendant, including every member of Petitioners' class, is individually assessed at hiring to insure that he or she can and does meet Western's standards. Thereafter, each flight attendant is individually assessed against the standard he or she has already met. That a male or female flight attendant subsequently fails to satisfy the standard has nothing to do with his or her sex.

Petitioners ask this Court to preclude an employer from differentiating in any way between its male and female employees in establishing grooming and appearance standards. Where an employer's grooming and appearance standards are evenhandedly applied and equally maintainable by both sexes, courts should not become enmeshed in evaluating the details of those standards. If Petitioners' theory were adopted, courts would be required to determine whether an airline can lawfully preclude its male pilots from wearing long hair and earrings or its female pilots from wearing "punk" crewcut hairstyles. Every circuit court which has addressed grooming and appearance standards has held that Congress did not intend for courts to get involved with such issues under the guise of Title VII. *Manhart* and *Norris* are not inconsistent with those holdings.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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No. 83-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

and

ASSOCIATION OF FLIGHT ATTENDANTS,

Petitioners,

—against—

WESTERN AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Respondent puts forth two arguments in opposition to the petition for certiorari. Both arguments completely mischaracterize the nature of the case.

Respondent first claims that its weight standards are beyond the reach of Title VII because they are reasonable grooming and appearance standards evenhandedly applied to both sexes. (Resp. Br. p. 4) However, Respondent does not dispute the fact that failure to meet Western's weight standards resulted in the suspension and termination of female employees whose appearance had been judged satisfactory. Respondent's weight requirements are therefore not appearance standards at all. The proposition stated by Respondent and the cases cited therefor are not applicable to the instant matter.

Respondent's second argument is that this Court's decisions in Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978) and Arizona Governing Committee v. Norris, ____ U.S. ____ S.Ct. 3492 (1983) are inapplicable because in those cases every woman paid higher premiums or received lower

benefits solely because she was a woman and not because of an individual assessment of her life expectancy. (Resp. Br. p. 9) Respondent's use of sex based weight standards is unlawful for the same reason that the use of sex based actuarial tables was held unlawful in Norris and Manhart. Respondent does not dispute the fact that in this case women have been suspended or terminated from employment solely because they are women and not because of -- and sometimes in spite of -- individual assessments of their appearance.*

Respondent's brief thus states no good reasons for denial of the petition.

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* Western's claim that its weight program does not violate the statute because every individual flight attendant has at one time been able to meet its requirements is nonsensical. If every individual woman were able to meet Western's weight requirements at all times there would be no case before this Court. Western has never contended that any of the plaintiff class intentionally failed to meet Western's weight standards.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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